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Case and Comment

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CASE AND COMMENT.

Corporations—Ultra Vires—Contract—Estoppel.—Fruin Colnon Contracting Company vs. Chatterson, et al., 143 S. W.., 6 (Ky.,)—Held, that one contracting with a corporation is estopped to deny its charter power to contract or corporate existence in an action to enforce the contract.

The early courts rigidly applied the principle that where a corporation is attempting to enforce its ultra vires contracts courts of justice will withhold their aid, Chillocothe Bank vs. Swayne, 8 Ohio, 257; New York Fireman Insurance Company vs. Ely, 5 Conn., 560. They applied it with equal rigor in denying relief to persons contracting with corporations. McCullock vs. Moss, 5 Den., N. Y., 567. But it is now a settled principle of law, where a contract with a corporation, the making of which is beyond its granted powers, neither of them can assert its invalidity as a ground of relief against it. Parish vs. Wheeler, 22 N. Y., 494; Mitchell vs. Beckman, 64 Cal., 117. However as long as an ultra vires contract is wholly executory on both sides it is void, and neither party is estopped to deny the power of the corporation to make it. Day vs. Springs Buggy Co., 58 Mich., 146; Thomas vs. West Jersey R. Co., 101, U. S., 71. Where the contract is executory on one side only, and has been executed on the other, the courts differ as to whether an action will lie on the contract by the party furnishing the consideration. Some courts hold that the contract is void, and that no action will lie upon it. Cent. Transp. Co. vs. Pullman Palace Car Co., 139 U. S., 24; Davis vs. Old Colony R. Co., 131 Mass., 258. Other courts hold with the principal case that the party receiving the consideration is estopped to set up the contract as ultra vires in order to defeat an action on the contract. Whitney Arms Co., vs. Barlow, 63 N. Y., 62; Wright vs. Pipe Line Co., 101 Pa., St., 204.

Easements—Private Ways—Appurtenant to Land—Hammonds et al., 142 S. W., 379, (Ky.)—Held, that under a deed giving the grantee the right to pass over the remaining lands of the grantor to reach the lands conveyed when an adjoining stream should be "past fording,"

the right of way was not personal to the grantee, but appurtenant to the land.

An easement is never presumed to be in gross when it can fairly be construed to be appurtenant to same estate, Dennis vs. Wilson, 107 Mass., 591; Oswald vs. Wolf, 126 Ill., 542; Sanxay vs. Hunger, 42 Ind., 44. Whether the right of way, in the principal case, is appurtenant to land or in gross should be determined by the nature of the right and the intention of the parties creating it. French vs. Wiliams, 82 Va., 462. A granted right of way is not in gross when there is anything in the deed or the situation of the property which indicates that it was intended to be appurtenant to the land granted. Knecken vs. Valtz, 110 Ill., 264. And it is a general rule that where an easement is manifestly intended for the benefit of the principal estate it will be held to be a permanent easement rather than a personal one, and this , although no words of inheritance are used, Chappel vs. N. Y., etc., R. Co., 62 Conn. 195.

Infants—Validity of Contracts—Estoppel to Deny—County Board of Education vs. Hensley, 144 S. W., 64 (Ky.)—Held, that when an infant, by reason of his appearance, surroundings, and activities, coupled with a misrepresentation or fraudulent concealment, leads one, who deals with him in good faith and not knowing that he is an infant, to believe that he is of age, he will be estopped from maintaining an action to avoid his executed contract.

The great preponderance of American authority holds that an infant is not estopped from setting up his infancy as a defense to an action on a contract, even though he secured the contract by falsely representing himself to be of age. Bursley vs. Russell, 10 N. H., 184; Merriam vs. Cunningham, 11 Cush., 40; Sims vs. Everhardt, 102 U. S., 300. Contra, Commander vs. Brazile, 88 Miss., 668. But where the infant is seeking affirmative relief from a conveyance or other executed contract which he has obtained by such fraudulent representations, many cases hold that he is estopped from basing his petition on the fact of his infancy. Ryan vs. Growney, 125 Mo., 474. Contra. Tobin vs. Spany, 85 Ark., 556. One who with knowledge of the facts, receives and retains the proceeds of a sale made when he was an infant, has frequently been deemed to be estopped from alleging his infancy in a suit to set aside the sale. Price vs. Winter., 15 Fla., 66; Pursley vs. Hays, 17 Iowa, 310. On the other hand, it seems generally agreed that an estoppel is not created by mere failure to give notice of the fact of infancy. Buchanan vs. Hubbard, 96 Ind., 1; Thormallen vs. Kaeppel, 86 Wis., 378. In a few states it is provided by statute that a contract can not be disaffirmed where on acount of an infant's misrepresentation the person dealing with him had reason to believe him legally capable of contracting. Beickler vs. Guenther, 121, Iowa, 419; Dillon vs. Burnham, 43 Kansas, 77.

Mandamus—Officers Subject to Mandamus—General Council of City.—City of Paducah vs. Board of Education of City of Paducah, 145 S. W., 1, (Ky.)—Held, that where it is for the general council to appor-

tion revenues, and include in their apportionment the amount to be applied to school purposes, as provided by statute, any attempt to defeat the demands of the board of education, either by insufficient or by an insufficient levy, may be prevented by mandamus.

Municipal legislative bodies, like the superior legislative bodies of the State government, in the performance of purely legislative functions, are exempt from coercion by mandamus. Young vs. Carey, 80 Ill. App., 601. But mandamus lies to compel the proper authorities to perform their ministerial duties. People vs. Raymond, 186 Ill., 407. Thus mandamus lies to compel a city council to distribute and pay over the moneys apportioned for school purposes, How vs. State, 89 Ind., 249; Plainfield Board of Education vs. Sheridan, 45 N. J. L., 276; and to appropriate a sum of money for the maintenance of a public board when a statute makes it their duty to do so. State vs. Shakespeare, 41 La., Am., 156; Pekins vs. Slack, 86 Pa., St., 270. But where the authorities are vested with exclusive discretionary powers in the disbursements and distribution of school funds, or apportioning money for school purposes mandamus does not lie to compel their discretion, Newark vs. Newark Board of Education, 30 N. J. L., 374.